STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 21, 2014
v	No. 314907 Wayne Circuit Court
JOHN THURMAN CALHOUN, Defendant-Appellant.	LC No. 12-007919-FH

Before: RIORDAN, P.J., and DONOFRIO and, BOONSTRA JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of third-degree fleeing and eluding a police officer, MCL 257.602a(3), as an aider and abettor, MCL 767.39, carrying a concealed weapon in a motor vehicle (CCW), MCL 750.227(2), and possessing a firearm during the commission of a felony, MCL 750.227b(1). The trial court sentenced defendant to serve a term of two years in prison for the felony-firearm conviction, concurrent with sentences of three years' probation each for the convictions of fleeing and eluding and concealed carry. Defendant appeals as of right, challenging the sufficiency of the evidence in support of his convictions. We affirm.

At trial, two Michigan State troopers testified that defendant was a passenger in a vehicle that they had pulled over for a traffic stop. As Trooper Darby O'Dell neared the passenger-side door, she noticed a revolver sitting on defendant's lap. Defendant then grabbed the car's gear shifter, put the car into drive, and yelled "go, go, go" to the driver, upon which the vehicle sped down the street with the troopers giving chase in their squad car. The chase ended with the suspects' car colliding with another vehicle. Trooper John Ferguson stated that after the accident, he saw defendant with a gun in a holster.

Defendant argues on appeal that his three convictions should be reversed because there was insufficient evidence for a fact-finder to find beyond a reasonable doubt that all of the crimes were committed.

When reviewing the sufficiency of evidence in a criminal case, a reviewing court must view the evidence of record in the light most favorable to the prosecution to determine whether a rational trier of fact could find that each element of the crime was proved beyond a reasonable doubt. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). Importantly, the prosecution need not negate every reasonable theory of innocence but, instead, must only prove

the elements of the crime in the face of whatever contradictory evidence is provided by the defendant. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). "All conflicts with regard to the evidence must be resolved in favor of the prosecution. Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime." *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005) (citations omitted).

I. FLEEING AND ELUDING

In order to sustain a conviction of third-degree fleeing and eluding a police officer, the prosecutor must prove the following six elements beyond a reasonable doubt:

> (1) the law enforcement officer must have been in uniform and performing his lawful duties and his vehicle must have been adequately identified as a law enforcement vehicle, (2) the defendant must have been driving a motor vehicle, (3) the officer, with his hand, voice, siren, or emergency lights must have ordered the defendant to stop, (4) the defendant must have been aware that he had been ordered to stop, (5) the defendant must have refused to obey the order by trying to flee from the officer or avoid being caught, which conduct could be evidenced by speeding up his vehicle or turning off the vehicle's lights among other things, and (6) some portion of the violation must have taken place in an area where the speed limit was thirty-five miles an hour or less, or the defendant's conduct must have resulted in an accident or collision, or the defendant must have been previously convicted of certain prior violations of the law as listed in MCL 750.479a(3)(c). [*People v Grayer*, 235 Mich App 737, 741; 599 NW2d 527 (1999).]

Defendant, however, was convicted on an aiding and abetting theory. One who procures, counsels, aids, or abets in the commission of an offense may be convicted and punished as if the person directly committed the offense. MCL 767.39; *People v Robinson*, 475 Mich 1, 5-6; 715 NW2d 44 (2006). To support a verdict that a defendant aided and abetted a crime, the prosecutor must prove that "(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time [the defendant] gave aid and encouragement." *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004). "An aider and abettor's state of mind may be inferred from all the facts and circumstances." *People v Carines*, 460 Mich 750, 758; 597 NW2d 130 (1999). Some of the factors that may be considered include a close association between the defendant and the principal and the defendant's participation in the planning or execution of the crime. *Id.*

Defendant concedes that the driver committed the offense of third-degree fleeing and eluding a police officer but argues that what he is alleged to have done did not constitute aiding and abetting for purposes of bringing criminal liability. Defendant argues that telling the driver "go, go, go" and merely touching the gear shifter do not amount to the "active complicity" this Court identified in *People v Branch*, 202 Mich App 550; 509 NW2d 525 (1993), in connection with a passenger who gave directions to the driver of a fleeing car and threw cans of beer at pursuing police officers. We do not find this argument persuasive.

First, *Branch* did not set out any special or heightened requirements that must be met in order to sustain a conviction of fleeing and eluding based on an aiding and abetting theory. In fact, the Court recognized that all that was required to prove the *actus reus* of the crime was that the defendant "assist[ed] someone else to commit" the crime of fleeing and eluding. *Id.* at 552.

Second, the evidence was sufficient for the fact-finder to find beyond a reasonable doubt that defendant (1) performed acts or gave encouragement that assisted the commission of the crime and (2) intended the commission of the crime. According to testimony of Trooper O'Dell, defendant did more than simply "touch" the gear shifter—he grabbed and shifted it, putting the vehicle into drive. Further, defendant yelling to the driver to "go, go, go" clearly illustrates that defendant intended to assist, or at least encourage, the driver in committing the crime. Presence at the commission of criminal conduct coupled with encouragement for the principal to commit the crime is sufficient to constitute aiding and abetting. *People v Moore*, 470 Mich 56, 63; 679 NW2d 41 (2004).

Therefore, there was sufficient evidence to support his conviction of fleeing and eluding on an aiding and abetting theory.

II. WEAPONS OFFENSES

Defendant contends that because no gun was ever introduced into evidence at trial, a fact-finder could not have found that he ever possessed any weapon. Although the actual firearm itself was never introduced as evidence, the troopers' testimonies were sufficient to prove the elements of defendant's gun-possession crimes. Defendant cites no authority for the proposition that conviction of a possession offense requires that the actual thing possessed be put into evidence. Trooper Ferguson testified that he saw defendant with a gun in a holster after the vehicle crash, and Trooper O'Dell testified that she saw a revolver sitting on defendant's lap at the initial traffic stop. This direct evidence was sufficient for a fact-finder to conclude beyond a reasonable doubt that defendant possessed a gun. See *People v Parr*, 197 Mich App 41, 45; 494 NW2d 768 (1992) (rejecting the defendant's argument that the gun, itself, was necessary to be admitted into evidence).

Defendant also claims that there was no evidence regarding whether the gun was real, as opposed to a toy, or whether it otherwise constituted a firearm for purposes of the statutes.

With respect to the crime of CCW, MCL 750.227(2), defendant claims that there was no showing that the gun was operable. However, this Court has held that it is the defendant's burden to prove that the pistol was not operable: "An affirmative defense to carrying a concealed pistol can be made by the presentation of proof that the pistol would not fire and could not readily be made to fire." *People v Gardner*, 194 Mich App 652, 655; 487 NW2d 515 (1992). Here, defendant offered no evidence at trial that the gun was inoperable or otherwise was not a pistol under the CCW statute. Therefore, the fact-finder was entitled to conclude that the pistol was operable. See *Parr*, 197 Mich App at 45.

However, with respect to felony-firearm, this Court has concluded that the felony-firearm statute, MCL 750.227b(1), does not require that the "firearm" be operable at the time the offense is committed. *People v Brown*, 249 Mich App 382, 383-385; 642 NW2d 382 (2002). And, as discussed above, defendant made no argument or showing that the pistol recovered from his

person was not a firearm under the felony-firearm statute. Accordingly, the evidence was sufficient to allow the fact-finder to conclude that the pistol was a "firearm" under the statute. See *Nowack,* 462 Mich at 400 (stating that the prosecution need not negate every reasonable theory of innocence); *Parr*, 197 Mich App at 45.

Affirmed.

/s/ Michael J. Riordan
/s/ Pat M. Donofrio
/s/ Mark T. Boonstra